MOHAMED ALIAS v. PUBLIC PROSECUTOR

[A.Cr. J. (Charles Ho J.) November 16, 1981]
[Kota Kinabalu – Criminal Appeal No. 11 of 1981]

Bribery & Corruption – Burden of proof – Misdirection on trial Magistrate's part regarding burden cast on accused – Prevention of Corruption Act 1961, ss. 4(a), 13 & 14

Evidence – Witness's testimony containing discrepancies – Witness considered unreliable – Trial Magistrate must state clearly whether testimony to be disregarded completely

The appellant in this case was convicted by the Magistrate Court on a charge under section 4(a) of the Prevention of Corruption Act 1961, and was sentenced to 4 months' imprisonment and ordered to pay a sum of $60. He appealed against sentence and conviction.

The case for the prosecution was that the appellant as a police officer demanded and obtained a sum of $60 from P.W. 4 for forbearing to take any action against P.W. 4 in respect of a traffic offence. The defence claimed that the sum of $60 received by the appellant was repayment of a loan which the appellant had made to P.W.4 as evidenced by a letter signed by P.W.4.

There were a number of discrepancies in P.W.4's testimony and the learned trial Magistrate regarded him as an unreliable witness. She, however, did not state whether she rejected the whole of the testimony given by P.W. 4 in her judgment. The defence relied on the evidence of D.W. 2, one Martin Pandan. His testimony if believed, would have corroborated the appellant's story that the $60 was repayment of the loan. The learned trial Magistrate held that "it is unsafe to give great reliance on D.W.2's evidence".

Held: allowing the appeal (1) the fact that there are discrepancies in a witness's testimony does not straight-away make him an unreliable witness and make the whole of his evidence unacceptable. It is open to the court having observed the demeanour of the witness and after careful consideration of such discrepancies to accept parts of the witness' evidence if it considers them to be true;

(2) it is important for the trial Magistrate to state clearly whether the testimony of a certain witness whom he or she considers as unreliable is to be disregarded completely;

(3) the burden cast on the appellant to rebut on the presumption under section 14 of the Prevention of Corruption Act 1961 was a light one. If some reliance could be put on D.W.2's evidence then the appellant must be said to have succeeded in rebutting such presumption. Clearly, the learned trial Magistrate misdirected herself on the burden cast on the appellant, and a re-trial should therefore be ordered.

CRIMINAL APPEAL.

Abdul Razak Rouse for the appellant.

Abdul Malik bin Haji Ishak (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Charles Ho J.: The appellant in this case was convicted by the Magistrate Court of the First Class at Labuan on a charge under section 4(a) of the Prevention of Corruption Act, 1961, and was sentenced to 4 months' imprisonment and ordered to pay a sum of $60/- under section 13 of the said Act. He appealed against sentence and conviction.

I heard the appeal on October 6, 1981 and allowed it. I ordered a retrial in this case. I said I would reduce the grounds of my decision in writing which I now do.

The petition of appeal contained seven grounds, most of which are overlapping. Counsel for the appellant decided, I think correctly, at the outset of the hearing to pursue two of the grounds only. In view of the order for retrial which I have made I do not think I should go into the evidence or comment on it too far.

Very briefly the case for the prosecution was that the appellant as a police officer demanded and obtained a sum of $60/- from P.W.4 for forbearing to take any action against P.W.4 in respect of a traffic offence. The defence very shortly was that the sum of $60/- received by the appellant was repayment of a loan which appellant had made to P.W.4 as evidenced by a letter signed by P.W.4.

The most important witness for the prosecution was undoubtedly P.W.4. He gave evidence regarding the circumstances which led to the demand for payment of the $60/- by appellant and the actual payment of the money to appellant. This witness was cross-examined by Counsel for appellant at great length. There were a number of discrepancies in his testimony and because of this the learned trial Magistrate regarded him as an unreliable witness. She, however, did not state whether she rejected the whole of the testimony given by this witness. She appeared to have relied on part of the evidence of this witness in her judgment. The fact that there are discrepancies in a witness' testimony does not straight-away make him an unreliable witness and make the whole of his evidence unacceptable. It is open to the court having observed the demeanour of the witness and after careful consideration of such discrepancies to accept parts of the witness' evidence

if it considers them to be true. It is important, in my view, for the trial Magistrate to state clearly whether the testimony of a certain witness whom he or she considers as unreliable is to be disregarded completely. In considering the discrepancies the court should take into account the educational background and experience of the witness and whether the witness is describing events which have taken place recently or a long time ago and the demeanour. It was contended by counsel for the appellant that since the learned trial Magistrate had considered P.W.4 as unreliable she should not have called upon the appellant to make his defence. I do not think I can fully agree with counsel on this. The learned trial Magistrate could have made the decision not to call upon the appellant to make his defence. There was, however, evidence apart from the testimony of P.W.4, that the sum of $60/- was in fact received by the appellant. This coupled with the fact that the appellant was a police officer would appear to be sufficient to raise the presumption under section 14 of the Act which reads:–

"where in any proceedings against a person for an offence under section 3 or 4 it is proved that any gratification has been paid or given to or received by a person in the employment of any public body, such gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinafter mentioned, unless the contrary is proved."

The defence called one Martin Pandin (D.W.2) who was an Assistant District Officer in Labuan, as a witness. His testimony, if believed, would have corroborated the appellant's story that the $60/- was a repayment of the loan. According to this witness the appellant and his father-in-law came to his office and showed him a document. He called the complainant (P.W.4) to his office and showed the complainant the document. The complainant confirmed that the signature on the document was his and told him that the borrowed money from appellant. The learned trial Magistrate was very careful in considering the evidence given by this witness and came to the conclusion that "it is unsafe to give great reliance on D.W.2's evidence." It is clear from this that the learned trial Magistrate did not reject D.W.2's evidence and still felt that some reliance could be put on such evidence. The burden cast on the appellant to rebut the presumption under section 14 of the Act was a light one. With respect, I think, if some reliance could be put on D.W.2's evidence then the appellant must be said to have succeeded in rebutting such presumption. The reason the learned trial Magistrate did not come to that conclusion was probably due to what she said at page 184 of her judgment:–

"However, even though I'm willing to give D.W.2's story great reliance, I have nevertheless asked myself if D.W.2's testimony would in any manner cast a doubt on the Prosecution's case. My answer to that is in the negative. It is my humble opinion that whatever doubt that could be cast by D.W.2's story on the Prosecution's case as to the guilt of the accused is being negatived by one piece of circumstantial evidence of subsequent conduct which tends to support the guilt of the accused."

Clearly the learned trial Magistrate misdirected herself on the burden cast on the appellant.

For reasons given above I allowed the appeal and I ordered a retrial.

Appeal allowed; Retrial ordered.

Solicitors: *Rayner & Co.*

PUBLIC PROSECUTOR v. JAMES TAN

[A. Cr. J. (Charles Ho J.) January 10, 1983]
[Kota Kinabalu – Criminal Appeal No. 9 of 1982]

Criminal Law & Procedure – Charge of corruption – Prosecution failed to prove prime facie case – Facts more consistent with offence of cheating – Whether learned Magistrate should amend charge to one of cheating.

The prosecution appealed against the order of the learned Magistrate discharging and acquitting the respondent at the close of the prosecution case on a charge under section 3(a)(ii) of the Prevention of Corruption Act 1961. The learned Magistrate found that the prosecution had failed to establish a *prima facie* case against the accused which if unrebutted would warrant his conviction of the offence as charged. The learned Magistrate held that the facts appeared more consistent with the offence of cheating by the accused, rather than corruptly receiving money on account of the income tax officers, and therefore did not call the accused to enter upon his defence.

The learned Deputy Public Prosecutor contended that in the light of the learned Magistrate's finding he ought to have exercised the powers conferred upon him by sections 158 and 173(h) of the Criminal Procedure Code to amend the charge.

Held: (1) where the facts do not establish a *prima facie* case against the accused person on the charge preferred against him but disclose another offence for which he is not charged, the learned President or Magistrate unless he has good reason not to do so, ought to amend the charge;